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No.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

WALTER FEINSTEIN, JACK KRIEGSMAN,
LEO MILLER, MORTON H. PASTOR and
JASON I. GREEN,
Petitioners,

VS.

NETTLESHIP CO. OF LOS ANGELES,
PACIFIC INDEMNITY COMPANY,
INSURANCE COMPANY OF NORTH AMERICA,
HARDWARE MUTUAL CASUALTY COMPANY,
AMERICAN RE-INSURANCE COMPANY, and
NORTH AMERICAN RE-INSURANCE CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

The single question of law presented for review by this Court is:

> Whether the willful creation and maintenance of an admittedly unlawful insurance monopoly which excludes competition and which substantially damages consumers of insurance is exempt from prosecution under the federal antitrust laws by the *McCarran-Ferguson Act*, 15 U.S.C. §§ 1011-1013.

PARTIES IN THE COURT OF APPEALS

The parties to the proceeding in the court below are those named in the caption of the case in this Court.

TABLE OF CONTENTS

	Page
Question presented	i
Parties in the court of appeals	i
I	
Opinions below	1
II	
Grounds on which the jurisdiction of this court is invoked	1
III	
Basis for federal jurisdiction in the district court	1
IV	
Statutory provisions involved	1
V	
Statement of the case	4
A. The nature of the case	4
B. Initial proceedings in the District Court	5
C. Initial proceedings on appeal	7
D. Post-remand proceedings in the District Court	7
E. Final disposition in the court of appeals	15
VI	
Reasons relied on for allowance of the writ	16
A. Preliminary statement—the procedural points	16
B. The question of federal law presented is of substantial importance to the national economy	17
C. The decision rendered by the court of appeals decides a question of federal law in a way which conflicts with applicable decisions of this court	20
1. Southeastern underwriters and the McCarran-Ferguson Act	20
2. Monopoly and the McCarran-Ferguson Act	21
Conclusion	27

TABLE OF AUTHORITIES CITED

Cases

	Page
American Tobacco Co. v. United States, 328 U.S. 781 (1946)	26
Owens v. Aetna, 654 F.2d 218 (3d Cir.), cert. denied 554 U.S. 1092 (1981)	26
Reiter v. Sonotone, 442 U.S. 330, 99 S.Ct. 2326 (1979)	18
Standard Oil v. United States, 221 U.S. 1 (1910)	26
St. Paul Fire & Marine Insurance Co. v. Barry, 438 U.S. 531 (1978)	17, 21, 23, 24, 25, 26, 27
Travelers Insurance Corp. v. Blue Cross of Western Pennsylvania, 306 F.Supp. 219 (1969)	24
Travelers Ins. Co. v. Blue Cross of Western Pennsylvania, 361 F.Supp. 774 (1972)	24
United States v. Alcoa, 148 F.2d 416 (1945)	26
United States v. E. I. DuPont De Nemours, 351 U.S. 377 (1956)	26
United States v. Southeastern Underwriters Association, 322 U.S. 533, 64 S.Ct. 1162 (1944)	17, 18, 20
United States v. Swift & Co., 286 U.S. 106 (1932)	26
United States v. Topco Associates, Inc., 405 U.S. 596 (1972)	26

TABLE OF AUTHORITIES CITED

Statutes

	Page
California Insurance Code:	
Section 790.03(c)	21
Clayton Act:	
15 U.S.C. § 15	1, 2, 4
15 U.S.C. § 26	1, 4
McCarran-Ferguson Act:	
§§ 1011-1013	passim
§ 1012(b)	15, 23, 25, 26
§ 1013(b)	15, 21, 26, 27
Sherman Act:	
15 U.S.C. § 1	1, 2, 4, 20
15 U.S.C. § 2	1, 2, 4, 16, 20, 26
28 U.S.C.:	
§1254(1)	1
§ 1337(a)	1
Pennsylvania Nonprofit Hospital Plan Act of 1937, 40 P.S. § 1401 et seq.	24

Rules

Federal Rules of Civil Procedure, Rule 56(c)	11
Supreme Court Rule, Rule 20.4	1

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I

OPINIONS BELOW

The opinion of the court of appeals below is reported at 714 F.2d 928 and is reprinted as Appendix A. Included in Appendix A is the order of the court of appeals denying rehearing en banc.

The various orders of the District Court pertinent to dismissal have not been officially published and are reprinted as Appendices E, G, H, K and L.

II

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The decision of the court of appeals was entered on September 1, 1983. A timely filed suggestion for rehearing en banc was denied by order entered on November 18, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and pursuant to Rule 20.4 of the Rules of the Supreme Court of the United States.

III

BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

Federal jurisdiction in the District Court was invoked pursuant to 15 U.S.C. §§ 15 and 26 and pursuant to 28 U.S.C. § 1337(a).

IV

STATUTORY PROVISIONS INVOLVED

1. 15 U.S.C. §§ 1 and 2 [Sherman Act] provide in pertinent part:

Sec. 1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

Sec. 2

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.

2. 15 U.S.C. § 15 [Clayton Act] provides in pertinent part:

Sec. 15

(a) [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

3. 15 U.S.C. §§ 1011-1013 [McCarran-Ferguson Act] provide in pertinent part:

Sec. 1011

Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

Sec. 1012

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Sec. 1013

(a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, and the Act of June 19, 1936, known as the Robinson-Patman Anti-Discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

V

STATEMENT OF THE CASE

A. The Nature of the Case

This is a private antitrust suit filed by five individual physicians on behalf of a class of physicians doing business in the County of Los Angeles and is brought under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26[1] to recover damages for and secure injunctive relief against defendants' violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. Specifically, petitioners alleged that defendants had unlawfully monopolized interstate trade and commerce in policies of medical malpractice insurance sold to physicians in the Southern California market [Complaint; Appendix N, ¶¶ 9-15].

During the period 1963-1970, defendant Pacific Indemnity Company [Pacific] acted to insure individal physicians doing business in the County of Los Angeles against medical malpractice risks through its exclusive agent defendant Nettleship Co. of Los Angeles [Nettleship]. The remaining defendants, Insurance Company of North America, American Re-Insurance Company, North American Re-Insurance Corporation, and Hardware Mutual Casualty Company, are carriers of medical malpractice insurance who, together with Pacific, Nettleship, Allstate Insurance Company and others, formed and participated in a "pool" to underwrite and divide profits from policies sold by

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[1]On November 3, 1980, the District Court noted that defendants had abandoned their monopoly and indicated that the request for injunctive relief might, for that reason, be moot [*Hearing*, 11/03/80 *TR.* pp. 4-13].

Pacific to petitioners and to other members of the alleged class.

Defendants admitted that they had unlawfully combined and conspired to privately monopolize, and had unlawfully monopolized, interstate trade and commerce respecting policies of insurance sold to petitioners and to other physicians in the Southern California market. They further admitted that they had exercised their unlawful monopoly power to exclude competition and to unlawfully fix insurance rates in violation of California statute.

Defendants claimed that, as a matter of law,[2] an unlawful insurance monopoly was exempt from antitrust scrutiny by reason of the *McCarran-Ferguson Act*, 15 U.S.C. §§ 1011-1013. The District Court agreed, and the complaint was dismissed. The court of appeals affirmed the orders of dismissal. Given the importance of the question of federal law presented, and the direct conflict between the opinion of the court of appeals below and applicable opinions of this Court, petitioners submit that there are special and important reasons for issuance of this Court's writ.

B. Initial Proceedings in the District Court

The complaint was filed on November 13, 1969. By March 30, 1970, all defendants had filed answers for the most

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[2]Thus, in moving for summary judgment on the Section 2 monopolization claims defendants represented to the District Court that:

> It would be probably absurd of us to come in here and ask the court to decide whether there was a combination or conspiracy and restraint of trade or monopolization or attempt to monopolize on a motion for summary judgment [*Hearing*, 11/05/81, *TR.* p. 15].

part denying the material allegations of the complaint and asserting affirmatively that the action was, as a matter of law, barred by the *McCarran-Ferguson Act*, 15 U.S.C. §§ 1011-1013.

On September 1, 1970, defendants jointly moved the District Court, on the basis of the *McCarran Act*, for "partial summary judgment" [dismissal] of all claims asserted in the complaint except "those based upon allegations of boycott, coercion or intimidation." Eleven months later, on August 2, 1971, the District Court entered its order granting defendants' motion as a matter of law. [*Order* 08/02/71; Appendix L].

On June 9, 1975, fifteen months after discovery had been ordered closed, defendants filed a joint motion for "summary judgment" [dismissal] on all remaining issues. The motion was taken under submission by the District Court on June 26, 1975. Twenty-six months later, on August 31, 1977, the District Court entered an opinion and order granting defendants' motion on the legal ground that, as "outsiders" to the insurance industry, petitioners lacked standing to sue for insurance industry antitrust violations. [*Order*, 08/31/77; Appendix K]. A notice of appeal from the orders of August 2, 1971 and August 31, 1977 was timely filed on September 28, 1977 [Appendix J].

C. Initial Proceedings on Appeal

On November 7, 1979, petitioners appeared before the Court of Appeals to offer oral argument on the question of whether an unlawful insurance monopoly was exempt from federal antitrust prosecution. Argument was not accepted. Instead, the court on its own motion entered the following order of remand:

> The case is remanded to the district court for reconsideration for a period of ninety-one days. Remand is prompted by the intervening decision of *St. Paul Fire & Marine Insurance Co. v. Barry*, 434 U.S. 919, S.Ct. 391, 54 L.Ed.2d 275.
>
> It is suggested that the district court lift its final judgment before reconsidering the case. It is observed that appellees maintain that the decision below may be sustained on other grounds than *Addrisi v. Equitable Life Assurance Society of the United States*, 503 F.2d 725 (9th Cir. 1974), *overruled* by *St. Paul Fire & Marine, supra.*
>
> On any appeal from a new final judgment, records and briefs from this case may be transferred on motion or stipulation to the new numbered appeal. The existing panel of this court is to have any new appeal concerning the case below. [*Order of Remand*, 11/07/79; Appendix I].

D. Post-Remand Proceedings in the District Court

On January 15, 1980, defendants filed a "joint motion for reaffirmance of summary judgment." The motion was unaccompanied by supporting affidavit and sought "reaffirmance" only as to the District Court's August 31, 1977 order of dismissal. On January 28, 1980, the court of appeals extended the ninety-one day period of remand for an additional sixty-three days. On March 28, 1980, the

District Court vacated entry of its August 31, 1977 order of dismissal [*Order*, 03/28/80; Appendix H]. On August 11, 1980, and after further extension of remand, the District Court decided defendants' motion for "reaffirmance" and ruled:

> The matter having come before the Court and having been taken under submission, and the Court having considered the record and being fully advised, and good cause appearing therefor, hereby ORDERS that defendants' motion for reaffirmance of summary judgment is DENIED, except as to the following issue: "Whether defendants coerced plaintiffs into the purchase of other types of insurance from defendants as a condition precedent to the purchase of medical malpractice insurance from defendants." [*Order*, 08/11/80; Appendix G].

On November 3, 1980, the parties appeared for ruling on petitioners' motion for class certification and for pretrial proceedings. Respecting the motion for class action certification, the District Court announced:

> The Court: Well, I suppose at long last the Court is faced with the necessity of giving its final and last ruling on the motion to certify under Rule 23, and it does appear to the Court that from the posture of the case it is appropriate to certify for class action treatment.
>
> And it appears that the class should be defined as those Los Angeles physicians who purchased medical malpractice insurance from defendants between the years 1963 and 1970.

> Other than what has been articulated, or expressed, in the past in regard to class action certification, or all other considerations under Rule 23, is there anything further to be added either in support of application for class action certification or in oppositon thereto?
>
> Very well. The order will be as just articulated by the Court. [*Hearing*, 11/03/80, *TR.* pp. 3-4].

In this connection the District Court noted the general nature of the unlawful monopoly which petitioners intended to prove at trial:

> [The Court] On the commonality aspects of it, if the plaintiffs' case, as the Court understands the plaintiffs to tell the Court it is his case, is to establish that in the times in question there was brought into existence, pursuant to plan by the defendant or defendants or some of them, an arrangement under which it was at least difficult, if not perhaps almost impossible, to pursue their malpractice [insurance] needs, except by following the course provided and indeed mandated by the actions of the defendants, and that pursuant thereto almost all, perhaps all, of the malpractice insurance written in the area was accomplished in that fashion, is the commonality requirement not thereby met?
>
> [Mr. Westbrook-Pacific Indemnity] I think if all of those conditions are satisfied which Your Honor stated, yes.
>
> [The Court] Aren't you going to prove a case of that kind by your representations, Mr. Appel?
>
> [Mr. Appel] Your Honor is stating it absolutely correctly. [*Hearing*, 11/03/80, *TR.* pp. 22, 23].[3]

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[3]The District Court specifically advised the parties that the case had "ultimately [been brought] down to the point where it is clear that you [plaintiffs] have the legal entitlement to make a case and, as the court has at least intimated, to make it as a class action case." [*Hearing*, 11/03/80, *TR.* pp. 42-43].

The District Court next advised that further consideration and implementation of its November 3, 1980 ruling on class certification would be assisted by a written compilation and submission of the evidence to be presented by plaintiffs on the liability issues. [*Hearing*, 11/03/80, *TR.*, pp. 15-17, 22-23]. On January 13, 1981, petitioners filed their "Further Submission Pursuant to Proceedings Held on November 3, 1980 Re Hearing on Motion for Certification of this Action As a Class Action" [*Further Submission*, 01/13/81]. Thereafter, on February 2, 1981, the parties again appeared before the District Court and the court again addressed the questions of violation and class certification:

> We are probably at the point in this case where the Court should make its order certifying the class . . .
>
> The aspect of the case which perhaps presents some confusion is whether the likely evidence in support of the existence of boycott, coercion and intimidation looks like price-fixing evidence, and it probably will look like price-fixing evidence, but it seems to the Court that it is, nevertheless, evidence that comes into the case if only, and not only on the issue of damages, but with respect to the class which the Court contemplates certifying, and that is, those Los Angeles physicians and surgeons who purchased medical malpractice insurance from defendants between the years 1963-1970.
>
> The Court is satisfied that there are the necessary circumstances of numerosity, common questions of law and fact, typicality, adequacy of representation—all of those things seem to be present so far as it is necessary for the Court to make a finding to that effect.
>
> And that is, that those matters predominate over the separate issues, and the Court makes such a finding. [*Hearing*, 02/02/81, *Tr.*, pp. 5, 6].

Commencing on March 30, 1981, defendants began a sequential filing of motions for summary judgment, again urging that their unlawful monopolization was exempt from federal antitrust scrutiny by the *McCarran-Ferguson Act* as a matter of law. No new facts or intervening change in law were shown or asserted. In opposing defendants' motions, petitioners directed the attention of the District Court to various portions of the Rule 56(c) record where it was established that:

(1) during the period 1963-1966, at least two independent competing carriers of medical malpractice insurance were in fact forced to withdraw from the Southern California market because of defendants' conduct;

(2) in September, 1966, defendants stated in secret written minutes that they had "little or no competition" for the sale of policies of medical malpractice insurance in Southern California;

(3) in August, 1968 and after all competition had been eliminated, defendants met and secretly agreed to increase medical malpractice premiums in Southern California by one hundred *percent;*

(4) in April, 1969, defendants stated in secret written minutes that they had achieved "a 98 to 99 percent market penetration," and stated that "abortive attempts to start new malpractice [insurance] companies have to date been unsuccessful;"

(5) in June, 1969, defendants threatened to cancel insurance policies issued to any Southern California physician who acquired stock in a newly-formed medical malpractice insurance company;

(6) in August, 1969, defendants met and secretly agreed to again increase medical malpractice premiums by an additional one hundred and ten *percent* because, as they then stated, "the doctors have nowhere else to go;"

(7) an actuary expert in medical malpractice insurance retained by the California Medical Association studied the market in issue and provided the CMA with and testified to his expert written and entirely supported opinion that the *maximum* increase in 1969 rates put into effect by defendants should have been 23% as opposed to 110%; and,

(8) in 1969, when one of the named plaintiffs complained to defendant Nettleship about defendants' monopoly, he was told by Nettleship that "we have a gun to your head and there is nothing you can do about it";

(9) in 1970, defendant Nettleship filed a 10 million dollar counterclaim against petitioners for the stated purpose of producing a "Mexican standoff" in this case;

(10) as of June 30, 1971, defendants had collected roughly 62 million dollars in medical malpractice premiums as against 25 million dollars in losses.

On November 5, 1981,[4] the parties appeared before the District Court for oral argument on defendants' motions for summary judgment. During the course of this hearing, defendants announced that the District Court could take an unlawful monopoly as established, and could accept as true all of the facts and testimony included and refer-

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[4]The case by this time had been reassigned from the Honorable Robert J. Kelleher to the Honorable William Matthew Byrne, Jr.

enced in the affidavits, declarations and memoranda relied upon by petitioners in opposition to defendants' various motions for summary judgment [Appendix E, p. 49; Appendix F]. Thus, the following colloquy occurred between the District Court and counsel:

> [The Court] Let me ask you [Pacific Indemnity] at this point: You say that there is no evidence that has been put forward by the plaintiffs to support the claim. Now, the moving parties, in their affidavits —perhaps of necessity, but do in fact rely in great part upon conclusions—that "we didn't do that, and we didn't do that." The plaintiffs then come back with more specific factual presentations. Is it your position that this motion for summary judgment should be decided on the premise that the facts that the plaintiffs present are true?
>
> [Mr. Westbrook] Yes, I don't think—I mean I don't really have any problem with that. I don't think it is a question of burden of proof or credibility or anything of that sort, Your Honor.
>
> [The Court] Then, it is not a question of a triable issue of fact, because, in effect, you are saying, then, everything they set forth in their affidavits is correct.
>
> [The Court] I will put it this way. All of their evidentiary presentation is correct.
>
> [Mr. Westbrook] We are not arguing that the Court should not accord whatever evidence they can point to, that bears on these specific issues, full credibility. No, Your Honor, we are not. In other words, yes, you may take it as true.
>
> [The Court] Well, so that the Court of Appeals, some day, if they have this before them, can have an understanding that it is almost like a trial on stipulated facts, so they won't have to search for triable issues of fact?

[Mr. Westbrook] I think that's correct, Your Honor. [*Hearing*, 11/5/81, *TR.*, pp. 16-17].

On June 28, 1982, the District Court filed its order granting defendants' motion for summary judgment. With respect to petitioners' monopolization claims the District Court observed:

> The complaint alleges that the Defendants, along with LACMA, combined and conspired to monopolize, restrain trade, fix prices, and suppress competition in the business of insurance in Los Angeles. . . . Monopolization and attempt to monopolize are included in the general allegations of ¶¶ 14 and 15 of the Complaint.
>
> • • •
>
> The Defendants' challenge to the monopolization claim is based on the allegations of the Complaint. Construed liberally, the Complaint alleges that the Defendants gained a monopoly position in the Los Angeles malpractice insurance market by illegal means and then charged monopoly prices to the Plaintiffs.
>
> Defendants maintain that the facts pleaded in the Complaint establish the affirmative defense of the McCarran-Ferguson Act. When a complaint reveals facts constituting an affirmative defense to a particular claim, that claim should be dismissed. . . . Although such a defect is generally challenged on a motion to dismiss, it may be raised on a motion for summary judgment as well.
>
> Plaintiffs respond that the Complaint does not trigger the McCarran-Ferguson defense because monopolization constitutes "boycott" or "coercion" and therefore falls within the exception to the Act's exemption. At issue, is the scope of the statutory terms "boycott" and "coercion." The meaning of statutory terms is determined by the court as a matter of law. [citation omitted] If "boycott" or "coercion" includes monopo-

> lization, then a claim for relief has been stated and Plaintiff may attempt to prove the claim. If not, summary judgment will be entered against the Plaintiff on the claim of monopolization. [*Order*, 06/28/82, Appendix E, pp. 32-33].

The District Court found that "monopolization is merely the exercise by a single entity, rather than a group, of the power to fix terms of dealing [and does not] amount to boycott or coercion." It thus granted defendants' motion for summary judgment concluding that, as a matter of law, the *McCarran-Ferguson Act*, 15 U.S.C. §§ 1011-1013, extends federal antitrust exemption to admittedly unlawful monopolization.[5]

On July 22, 1982, petitioners timely filed a notice of appeal and, on appeal, requested review and reversal of the District Court's orders extending *McCarran-Ferguson Act* exemption to an unlawful insurance monopoly.

E. Final Disposition in the Court of Appeals

On September 1, 1983, the court of appeals rendered its opinion and affirmed the District Court, concluding that an unlawful insurance monopoly was, as a matter of law, entitled to *McCarran-Ferguson Act* exemption, and could not properly be equated with boycott, coercion or intimidation, 714 F.2d 928, 933-935. A petition for rehearing en banc was timely filed on September 15, 1983 and denied by the court on November 18, 1983 [*Order*, 11/18/83; Appendix A].

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[5]Petitioners' position was that an unlawful monopoly constitutes boycott, coercion and intimidation of the highest order within the meaning of 15 U.S.C. § 1013(b), and, additionally, was clearly not the type of conduct which Congress intended to exempt under 15 U.S.C. § 1012(b).

VI

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

A. Preliminary Statement—The Procedural Points

The complaint in this federal antitrust action alleges that the defendant insurers unlawfully monopolized an insurance market to the substantial damage of petitioners and other consumers of insurance. On motion by defendants the District Court held that a claim for unlawful monopolization had been stated under Section 2 of the *Sherman Act*, 15 U.S.C. § 2.[6] Based however on a legal conclusion that unlawful monopolization was not "economically coercive" conduct, the District Court dismissed the action as barred by the *McCarran-Ferguson Act*, 15 U.S.C. §§ 1011-1013 [Appendix E, pp. 45-46]. The court of appeals affirmed, finding that, as a matter of law, "monopoly alone is . . . not within any exception to the McCarran-Ferguson Act [exemption]" [Appendix A, p. 12].[7] Thus, the single

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[6]In the District Court defendants conceded the existence of genuine issues of material fact as to the lawfulness of their monopoly, and stipulated that the District Court would take as true the entire evidentiary showing made by petitioners [*Hearing*, 11/05/81; *TR.* p. 15; Appendix E, p. 49; Appendix F]. Thus, in considering whether an unlawful monopoly was exempt from the federal antitrust laws, the District Court found that defendants' "challenge to monopolization is based upon the complaint" [Appendix E, p. 33].

[7]Contrary to the procedure followed by the District Court, and contrary to the stipulation of the parties and the evidence, the court below purported to make findings of fact on appeal with respect to the merits of petitioners' claim for unlawful monopolization and attempted to construe petitioners' complaint as not alleging an unlawful monopolization [Appendix A, pp. 10-14]. At no time during the fifteen year pendency of this action did defendants so much as suggest that unlawful monopolization had not been properly

question of law presented for review by this Court is:

> Whether the willful creation and maintenance of an admittedly unlawful insurance monopoly which excludes competition and which substantially damages consumers of insurance is exempt from prosecution under the federal antitrust laws by the *McCarran-Ferguson Act*, 15 U.S.C. §§ 1011-1013.

The opinion of the court of appeals granting antitrust exemption to an admittedly unlawful insurance monopoly presents a question of federal law which is certain to have a very important effect upon the national economy and on the public and private enforcement of the federal antitrust laws as against unlawful insurance monopolies. Although the question of insurance monopoly exemption has not previously been presented squarely to this Court, the court of appeals has decided the question in a way which appears to conflict substantially with this Court's opinion in *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531 (1978) and other controlling authority.

B. The Question of Federal Law Presented Is of Substantial Importance to the National Economy

The decision below is truly startling in its actual and potential impact upon the national economy. As noted by this Court in *United States v. Southeastern Underwriters Association*, 322 U.S. 533, 64 S.Ct. 1162 (1944):

> The modern insurance business holds a commanding position in the trade and commerce of our Nation. Built upon the sale of contracts of indemnity, it has become one of the largest and most important branches

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pleaded. In fact, as noted above, the District Court expressly determined that unlawful monopolization had been stated in a manner sufficient to allow petitioners to prove that claim at trial [Appendix E, pp. 32-33].

> of commerce. . . . Perhaps no modern commercial enterprise directly affects so many persons in all walks of life as does the insurance business. Insurance touches the home, the family, and the occupation or the business of almost every person in the United States. *Id* 539-540.

In addition to denying remedy[8] to petitioners and the class members, the decision below conveys a clear message to the United States insurance industry that its members may act with impunity to unlawfully monopolize insurance markets in violation of federal antitrust statutes. Insurers and their agents are, under authority of the decision below, completely privileged to create and maintain monopolies in various insurance markets, and are free to do so notwithstanding that such conduct has been determined by Congress and by this Court as clearly inimical to the national interest. Thus, in applying the federal antitrust laws to the insurance industry[9] this Court stated:

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[8]In *Reiter v. Sonotone*, 442 U.S. 330, 99 S.Ct. 2326 (1979), this Court noted the strong interest of consumers in the proper and vigorous enforcement of the federal antitrust laws and observed:

> In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., supra*, after examining the legislative history of § 4, we described the Sherman Act as "conceived of primarily as a remedy for '[t]he people of the United States as individuals,' especially consumers," and the treble-damages provision of the Clayton Act as "conceived primarily as 'open[ing] the door of justice to every man . . . and giv[ing] the injured party ample damages for the wrong suffered.'" . . . Congress created the treble-damages remedy of § 4 precisely for the purpose of encouraging *private* challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations [emphasis in original; *Id.* 343-344].

[9]*United States v. Southeastern Underwriters Assn*, 322 U.S. 533 (1944).

> A general application of the [Sherman] Act to all combinations of business and capital organized to suppress commercial competition is in harmony with the spirit and impulses of the times which gave it birth. "Trusts" and "monopolies" were the terror of the period. Their power to fix prices, to restrict production, to crush small independent traders, and to concentrate large power in the few to the detriment of the many, were but some of numerous evils ascribed to them. The organized opponents of trusts aimed at the complete destruction of all business combinations which possessed potential power, or had the intent, to destroy competition in whatever the people needed or wanted. So great was the strength of the anti-trust forces that the issue of trusts and monopolies became non-partisan. The question was not whether they should be abolished, but how this purpose could best be accomplished [footnotes omitted; *Id.* 553-555]

Petitioners have for fifteen years persisted in the prosecution of this action because of the disastrous past and probable future effects of an unlawful monopoly on the business of physicians and others who must purchase insurance as a matter of economic necessity. As applied to the facts in this case, the rule of law announced by the court of appeals has the effect of granting full federal antitrust exemption to an unlawful monopoly which, after excluding all competition, arbitrarily quadrupled the prices charged to physicians for medical malpractice insurance, thus requiring a substantial number of physicians to drastically restrict and, in some instances, to altogether abandon their medical practices. Resolution by this Court of the issue of law presented by petitioners will necessarily have a significant impact upon both the business of insurance and the national public health care industry.

Petitioners respectfully submit that the resources of this Court would be well spent in reviewing the question presented. Review would both ensure continued enforcement of the federal antitrust laws in the insurance sector of the national economy, and would nip in the bud an erroneous rule of law promulgated by the court of appeals below which is bound to engender conflict and confusion in other courts of appeal and in the prosecution and maintenance of public and private actions for relief against unlawful monopolies.

C. The Decision Rendered by the Court of Appeals Decides a Question of Federal Law in a Way Which Conflicts with Applicable Decisions of this Court

1. Southeastern Underwriters and the McCarran-Ferguson Act

In *United States v. Southeastern Underwriters, supra,* this Court held that the business of insurance was sufficiently interstate in character for purposes of the *Sherman Act,* 15 U.S.C. §§ 1, 2. Subsequently, because of a threat by the insurance industry to not pay taxes assessed by the several states, and because certain insurance industry practices which might arguably violate the federal antitrust laws were permitted by some states as salutary and in the public interest, Congress enacted legislation[19] which declared that the states could properly continue to tax the business of insurance, and which declared that, after a three year moratorium, the federal antitrust laws would apply to the business of insurance to the extent such busi-

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[19] McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1013. Pertinent excerpts from the Congressional debates on the *McCarran-Ferguson Act* are reprinted in Appendix M to the instant petition.

ness was not regulated by state law, 15 U.S.C. §§ 1011-1012. At the same time, Congress expressly declared that, state regulation to the contrary notwithstanding, the federal antitrust laws would continue to apply fully to all agreements and acts of boycott, coercion and intimidation, 15 U.S.C. § 1013(b).

2. Monopoly and the McCarran-Ferguson Act

In *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531 (1978) this Court had occasion to consider the history, purpose and scope of the partial antitrust exemption afforded by the *McCarran-Ferguson Act*. Although the Court was divided on the legal question of standing which was then before it, the opinions filed in *St. Paul v. Barry* show that this Court was unanimous in its view that the partial exemption afforded by the *McCarran-Ferguson Act* did not extend to private insurance monopolies which were formed and maintained without state approval[11] or supervision. Thus, the majority opinion in *St. Paul* construed Section 1013(b) of the Act as rendering private insurance monopolies, created without state approval, subject to the federal antitrust laws and stated:

> "The debates make clear that the "boycott" exception was viewed by the Act's proponents as an important safeguard against the danger that insurance

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[11]The State of California expressly prohibits intrastate monopoly by insurers. Thus, California Insurance Code Section 790.33(c) prohibits "Entering into any agreement to commit, or by any concerted action committing, any boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance."

companies might take advantage of purely permissive state legislation to establish monopolies and enter into restrictive agreements falling outside the realm of state-supervised cooperative action.

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In Senator O'Mahoney's view, "[t]he vice in the insurance industry . . . was not that there were rating bureaus, but that there was in the industry a system of private government which had been built up by a small group of insurance companies, which companies undertook by their agreements and understandings to invade the field of Congress to regulate commerce." 91 Cong.Rec. 1485 (1945). The conference substitute, he insisted, "outlaws completely all steps by which small groups have attempted to establish themselves in control in the great interstate and international business of insurance." *Ibid.* Perhaps the most revealing discussion is found in his explanation of why the language of § 3(b) was limited to "boycotts, coercion, or intimidation," and did not reach all combinations among insurance companies and their agents. He stated:

> "[T]he committee was cognizant of the fact that many salutary combinations might be proposed and which ought to be approved, to which there was no objection. From the very beginning, Mr. President, of this controversy over insurance I have always taken the position that I saw no objection to combinations or agreements among the companies in the public interest *provided those combinations and agreements were in the open and approved by law. Public supervision of agreements is essential.*

. . . . .

> "[M]y judgment is that *every effective combination or agreement to carry out a program against the public interest of which I have had any knowledge* in this whole industry study *would be prohibited by* [*§ 3(b)*]." 91 Cong.Rec. 1486 (1945) (emphasis supplied).

The rules and regulations of private associations in the industry, while providing Senator O'Mahoney with a vivid example of "the sort of agreement which ought to be condemned," *ibid.*, exemplified a larger evil—"regulation by private combinations and groups," *id.*, at 1483—that required the continued application of the Sherman Act. [id. 547-549; footnotes omitted; emphasis in original]

Although dissenting from the majority's decision on standing to sue, Justices Stewart and Rehnquist read the Congressional debates and the statute to the same effect as the majority on the question of the necessity for state sanction or approval[12] of otherwise anticompetitive acts:

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[12]The proponents of the *McCarran-Ferguson Act* made it clear that it was state approval and supervision of certain insurance industry practices, and not state prohibition, which would trigger the partial exemption afforded by 15 U.S.C. § 1012(b):

> Mr. Pepper. Does that mean that the States can by their own laws defeat the applicability and operation of the Sherman Antitrust Act and the Clayton Act?
>
> Mr. O'Mahoney. I think the answer to that question will be clear when I point out that there are certain agreements which can normally be made in the insurance business which are in the public interest, but which might conceivably be a violation of the antitrust law, which prohibits combinations and agreements in restraint of trade.
>
> Mr. Pepper. Am I correct in saying that under the proviso which the Senator has just read, if a State made it an offense, under the laws of the State, to engage in combinations in restraint of trade, the Sherman Antitrust Act could not apply

> Repeatedly, Congressmen involved in the drafting of the statute drew a distinction between state regulation and private regulation. Congress plainly wanted to allow the States to authorize anticompetitive practices which they determined to be in the public interest, as indicated by formal state approval. Section 2(b) does just that. Congress just as plainly wanted to make sure that private organizations set up to govern the industry, such as the South-Eastern Underwriters Association, would not escape the reach of the federal antitrust laws. Section 2(b) also meets this concern to the extent that States do not authorize or sanction anticompetitive practices promoted by such organizations. [*Id.*, 565, footnotes omitted].

Petitioners have been able to find but a single reported decision where an attempt was made to bring monopolization within the *McCarran Act* exemption. In that case, *Travelers Insurance Corp. v. Blue Cross of Western Pennsylvania*, 306 F.Supp. 219 (1969), the court found that monopoly was not exempt as a matter of law and ordered a trial on the merits. The court in *Travelers, supra*, made it plain that, when a *bona fide* claim of monopolization under Section 2 is presented, "state approval"—even if present[13]

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to combinations and restraints of trade by companies engaged in business in that State? Is not that what it means?

Mr. O'Mahoney. No, I think that, for example, a rating bureau, formerly agreement among insurance companies, under the supervision and regulation of State would be permitted. 91 Congressional Record 1443, 1444.

[13]The Blue Cross hospital contracts in issue "were regulated and directed by the State of Pennsylvania under the Nonprofit Hospital Plan Act of 1937, 40 P.S. § 1401 *et seq.*, and were approved by the Pennsylvania Insurance Department after thorough consideration by it and after exhaustive public hearings on the matter." *Travelers Ins. Co. v. Blue Cross of Western Pennsylvania*, 361 F.Supp. 774, 776-779 (1972).

—is not dispositive as to *McCarran-Ferguson Act* exemption. Thus, in denying summary judgment and ordering that the case proceed to trial on the question of how Blue Cross achieved and exercised its market status the court noted the allegations of state approval and held that:

> Blue Cross counters that its acts are unassailable because they are mandated by the Insurance Commissioner of Pennsylvania. The doctrine enunciated in *Weiner v. Hospital Service Plan*, 13 Pa.Dist. & Co. R.2d 689, aff'd per curiam in 187 Pa.Superv. 244, 144 A.2d 575, however, to the effect that a statute requiring prior approval by a state insurance department of a non-profit hospitalization plan does not authorize the department to grant a monopoly to any one such corporation, compels the corollary that the department cannot thereby validate monopolistic practices by any one corporation. That all insurance industry acts of boycott, coercion, or intimidation condemned by the Sherman Act are subject to federal law is also clearly established in *Monarch Life Insurance Company v. Loyal Protective Life Insurance Company*, 326 F.2d 841 (2 Cir. 1963), cert. den. 376 U.S. 952, 84 S.Ct. 968, 11 L.Ed.2d 971.
>
> Travelers has, therefore, raised substantial factual issues concerning the competitive position and the competitive practices of Blue Cross in the insurance industry, which preclude the ascribing of McCarran Act immunity to the defendant on the present state of the record. 306 F.Supp. 219, 220-221.

Given the plain language of the statute, and given the reasoning of this Court in *St. Paul v. Barry*, petitioners submit that, although there are insurance industry combinations and practices which fall within the partial exemption provided by Section 1012(b), an admittedly unlawful

private monopoly is not one of them.[14] If there is any insurance industry practice which must, on any reading of the Act, remain open to federal antitrust scrutiny it is unlawful monopolization. Indeed, unlawful private monopoly is a paradigm[15] of the type of conduct which Congress intended be encompassed by Section 1013(b) and, for obvious reasons, denied the partial antitrust exemption afforded by Section 1012(b).

Petitioners submit that, since defendants' unlawful monopolization was neither approved nor sanctioned by state law,[16] defendants are not entitled to the partial antitrust exemption afforded by Section 1012(b), which exemption is

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[14]In *St. Paul v. Barry, supra*, this Court held that the conduct there considered fell squarely within the language and intendment of 15 U.S.C. § 1013(b) because it "effectively foreclos[ed] all possibility of competition anywhere in the relevant market" *Id* 533. This is, of course, the precise effect of the admittedly unlawful monopoly before this Court on the present record.

[15]The lower court's conclusion that monopoly is not economically coercive conduct contravenes the meaning and signification of Section 2 of the Sherman Act as it has been construed by numerous decisions of this Court, *Standard Oil v. United States*, 221 U.S. 1 (1910); *United States v. Swift & Co.*, 286 U.S. 106 (1932); *United States v. Alcoa*, 148 F.2d 416 (1945); *American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *United States v. E. I. DuPont De Nemours*, 351 U.S. 377 (1956); *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972).

[16]The view espoused by this Court in *St. Paul v. Barry* respecting the necessity for state approval and supervision has been adhered to by courts of appeal other than the court of appeals below. Thus, in *Owens v. Aetna*, 654 F.2d 218 (3d Cir.), *cert. denied* 554 U.S. 1092 (1981), the court correctly observed that, in passing the McCarran Act, Congress believed that "fixing of rate without statutory authority in the state [was wrong]," and observed that Congress clearly "did not intend to permit private price-fixing which the antitrust act forbids." *Id*, pp. 225.

limited to those situations in which a state has determined that certain anticompetitive conduct is in the public interest of its citizens. The court of appeals' decision to the contrary conflicts substantially with this Court's opinion in *St. Paul v. Barry, supra,* and must be reversed.

CONCLUSION

The decision of the court of appeals holding that an unlawful monopoly is entitled to exemption from prosecution under the federal antitrust laws is entirely without precedent. Defendants' assertion,[18] adopted by the District Court, and affirmed on appeal, that an unlawful monopoly is "merely the use of economic leverage to exact trade terms, not 'boycott' or 'coercion' " is a legal sophistication which is both unsupported and unsupportable.

An unlawful monopoly cannot be characterized as economically benign. It is, as common sense suggests, coercive in a way which can be appreciated completely by those who are made to suffer its effects. A privately created, unlawful insurance monopoly neither is nor should be characterized as anything other than extortion. It plainly is conduct which should be made "to pass muster under the Sherman Act," *St. Paul v. Barry,* id. 649, ftnt. 21.

For all the reasons stated, petitioners respectfully pray that this Court issue its writ and review and reverse the opinion of the court of appeals below, and permit peti-

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[18] [Appendix E, pp. 34, 45-46].

tioners to proceed to a trial on the merits of their monopolization claim.

Respectfully submitted,

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